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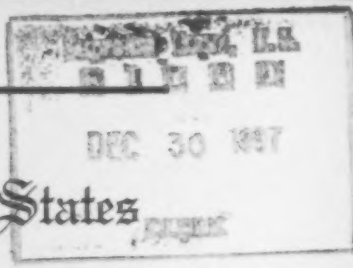


In The

# Supreme Court of the United States

October Term, 1997

ROBERT WAGNER and MARGARET WAGNER,

*Petitioners,*

*vs.*

PATRICIA DEVINE, KEVIN A. JOURDAIN, CHARLES E. MORAN, III, ARTHUR THERRIEN, JOHN E. WHELIHAN, THE CITY OF HOLYOKE, MASSACHUSETTS, THE INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS and LOCAL 388 OF THE INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit*

## BRIEF IN OPPOSITION FOR RESPONDENTS PATRICIA DEVINE, KEVIN A. JOURDAIN, CHARLES E. MORAN, III, JOHN E. WHELIHAN AND THE CITY OF HOLYOKE

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## QUESTION PRESENTED

Whether a Chief of Police who is a policymaker is protected by the First Amendment from a constructive discharge effected by a minority of the members of a city council, who are motivated by the Chief's political association with the Mayor with whom they had political differences.

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Pursuant to Supreme Court Rule 15, the Respondents, Patricia Devine, Kevin A. Jourdain, Charles E. Moran, III and John E. Whelihan (hereinafter collectively referred to as "Councilors") and the City of Holyoke ("City"), submit this brief in opposition to the petition for writ of certiorari ("Pet.").

## DECISIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit, reproduced at pages 1 through 11 of Appendix A to the petition, is reported at 122 F.3d 53 (1997). The earlier Memorandum of Decision and Order of the District Court of Massachusetts, Western Division, is not reported, and is included in Appendix B to the Petition at pages 1 through 7.

## STATEMENT OF JURISDICTION

The opinion of the First Circuit Court of Appeals was entered on August 1, 1997 (App. A). The petition was filed October 30, 1997, and was received by these Respondents on or about November 3, 1997. On December 3, 1997, these Respondents were granted an extension of time in which to file a response to the Petition for Writ of Certiorari to and including January 5, 1998.

## STATEMENT OF THE CASE

The Petitioners, Robert and Margaret Wagner ("Wagner"), filed their action on December 8, 1995 in the United States District Court for the District of Massachusetts, Western Division, pursuant to 42 U.S.C. § 1983, for recovery for alleged wrongful acts relating to Robert Wagner's resignation from employment as Chief of Police. Wagner claimed that his First Amendment freedom of political association[1] was violated when certain members of the City Council

1. While Wagner's complaint and his appellate briefs made passing references to alleged First Amendment violations based upon his political

(Cont'd)

and others subjected him to severe harassment, ultimately forcing him to resign, because of his political support for the Mayor. (App. A at 2). He also asserted ancillary state claims. *Id.* The Respondents filed motions to dismiss prior to answering the complaint (App. A at 2; App. B at 2), and the District Court, following arguments on the motions, dismissed the complaint. (App. B). That decision was upheld by the First Circuit Court of Appeals on August 1, 1997 (App. A).

The Petitioner, Robert Wagner, was appointed to the position of the Chief of Police of the City of Holyoke by the Mayor on July 8, 1991. (App. B 2-3). At that time, the Respondents, Patricia Devine, Kevin Jourdain, Charles Moran, and John Whelihan, were elected members of the Holyoke City Council, and comprised a minority of the fifteen member City Council. (App. A at 3-4, n.4). These Councilors were political adversaries of the Mayor (App. B at 3). Only the Mayor of the City of Holyoke has the authority to appoint or discharge the Chief of Police, although the City Council has the power to set the salary and benefits for the position, including the authority to reduce, or even eliminate, the Chief's salary. (App. A at 4, 10).

The Petitioners assert that the Councilors engaged in a campaign of harassment against him for the purpose of embarrassing the Mayor and forcing the Petitioner to resign. (App. A at 3). The campaign of harassment took the form of constant criticism, the reduction of his salary and benefits, an attempt to eliminate his salary, and a refusal to fund certain programs advocated by the Petitioner. *Id.* He contends that these actions were

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(Cont'd)
speech, as well as his political affiliation, the case was litigated solely on the theory that the Respondents harassed and constructively discharged the Petitioner based on his political beliefs and affiliation, and the Court of Appeals for the First Circuit confined its analysis to that context. (App. A at 3, n.3).

motivated solely by the Councilors' opposition to his political beliefs and his political support of the Mayor. *Id.* As a result of these actions, and the actions of the other Respondents, the Petitioner resigned in September of 1994, claiming that he was forced to do so because the Respondents' actions hindered, undermined and interfered with the performance of his duties, and thus constituted a constructive discharge. *Id.* at 4.

The District Court dismissed the Petitioners' complaint, holding that the "slurs and jibes" and harassments endured by the Petitioner were a natural "byproduct of our long-standing organization of political life into two or more parties," *Agosto-De-Feliciano v. Aponte-Roque*, 889 2d 1209, 1217 (1st Cir. 1989), and that the Chief of Police could reasonably be required to develop "a suitable thick skin" as a natural concomitant to the job. (App. B at 5). The Court concluded that the alleged harassment sustained by the Petitioner did not constitute a "constitutionally significant burden" on the Petitioner's right of political association, and accordingly, concluded that the Petitioners' Section 1983 action would prove unsuccessful, and dismissed that portion of his amended complaint. *Id.* Further, the Court concluded that the Chief of Police, like other "high-ranking policymakers in Holyoke" was not protected by the First Amendment from partisan attacks on his job performance. (App. B at 6-7).

On August 1, 1997, the First Circuit Court of Appeals affirmed the judgment of the District Court. (App. A). The Court concluded that

> [T]he First Amendment protection against patronage practices, as well as the exceptions for certain categories of highly placed employees, apply whenever public employees are at odds politically with their superiors and thus subject to politically discriminatory behaviors.

(App. A at 8).

The Court noted that the Petitioner, as Chief of Police, was an admitted high echelon employee or "policymaker"[2] within the city of Holyoke, and therefore fell well within the exceptions to the First Amendments' prohibition against patronage practices as outlined by this Court. *Id.* The Court's conclusion stems from its recognition that an administration's need to carry out its policies is matched by the "equally legitimate right of political opponents to exert pressure on behalf of their viewpoints and constituents" (*Id.* at 9), and that "policymakers" could be expected to face "stinging partisan attacks" by members of the City Council, exerting power within their authority, and that the First Amendment would not provide a shield to such attacks for those, such as the Chief of Police, whose positions are politically sensitive. (*Id.* at 10).

## REASONS FOR DENYING THE WRIT

Rule 10 of the Rules of the Supreme Court of the United Sates provides that "review on a writ of certiorari is not a matter of right, but of judicial discretion . . . granted only for compelling reasons." Certiorari is granted only in cases involving principles, the settlement of which is of importance to the public as distinguished from the parties. *NLRB v. Pittsburgh S.S. Company*, 340 U.S. 498 (1951). For the reasons set forth below, the petition fails to satisfy this criteria, and the petition should therefore be denied.

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2. The First Circuit used the term "policymaker" as a shorthand reference for the several categories of employees for whom partisan affiliation is an appropriate job criterion. (App. A at 7, n.7). That term is used similarly throughout this brief.

## I.

## THE FIRST CIRCUIT'S HOLDING THAT THE FIRST AMENDMENT DOES NOT PROHIBIT THE CONSTRUCTIVE DISCHARGE OF A POLICYMAKER BY HIS POLITICAL OPPONENTS, PARTICULARLY IN THE CIRCUMSTANCES OF THIS CASE, DOES NOT WARRANT REVIEW.

The crux of the Petitioners' argument is that high-level public employees retain certain First Amendment rights outside the patronage related employment situations and principles articulated by this Court in *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980) and *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990). In addition, the Petitioners argue that both the Court of Appeals and District Court opinions in this case misapplied the principles articulated in those cases. In essence, the Petitioners argue that the Supreme Court's patronage trilogy is confined to patronage practices by an employer, and not to adverse treatment by the employer's political adversaries or to politically motivated employment actions. (Petition 9-10, 12-15). While acknowledging that his position as Chief of Police qualifies him as a "high level public employee" (Pet. 7), a "policymaker", he contends that the politically motivated harassment waged against him by his political opponents and those of the Mayor violate his First Amendment protections and are outside the exceptions for such protection outlined in *Elrod*, *Branti*, and *Rutan*.

The Petitioners have construed this Court's holdings in *Elrod*, *Branti*, and *Rutan* too narrowly, however, and the First Circuit's holding in this case correctly applied the principles articulated in those cases.

As a general proposition, the First Amendment provides protection for public employees from adverse job action based

solely upon partisan political affiliation. *Elrod*, at 359. That protection, however, is not without exception. *Id.* at 360. The Court recognized that the competing First Amendment interest of the political party in power "to insure the policies which the electorate has sanctioned are effectively implemented", *Elrod*, at 372, and allowed patronage practices to continue for those employees who, *inter alia*, made policy or occupied positions of confidence. *Id.*; *Branti*, 445 U.S. at 517-18.

In *Branti*, the Court refined the "policymaker/confidential" test articulated in *Elrod* by holding that a state demonstrates a compelling interest in infringing First Amendment rights only when it can show that "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, *supra* at 518.

There is nothing inimical in the First Circuit's holding in this case to Supreme Court precedent. There is nothing in *Elrod*, *Branti*, or *Rutan* which would expressly limit the exceptions to the Petitioners' First Amendment protections to activities of the Mayor, the "employer" in this case.

> A government's interest in securing employees who will loyally implement its policies can adequately be served by choosing or dismissing certain high level employees on the basis of their political views. . . . [t]he First Amendment is not a tenure provision, protecting employees from actual or constructive discharge.

*Rutan*, 497 U.S. 74-76.

The Petitioners' argument ignores the fact that the Councilors are part of the "government" as well, and have an equal and just as compelling interest in exerting pressure on behalf of their viewpoints

and that of their constituents. Like the Mayor, the Councilors have an interest in insuring that their policies and agenda — policies presumably sanctioned by their electorate, *Elrod*, 427 U.S. at 367 — would be given voice and implemented.

As the First Circuit's opinion notes, the conflict in *Rutan* did not arise amidst the seating of the new administration, but involved the implementation of an executive order proclaiming a hiring freeze with "exceptions" allegedly made based upon political affiliation. That decision clearly indicates that the First Amendment protection against patronage practices, as well as the exceptions for high-level employees, apply whenever public employees "are at odds politically with their superiors and thus subject to politically discriminatory behaviors." (App. A at 8).

The First Circuit's decision in *Romero-Barcelo v. Hernandez-Agosto*, 75 F.3d 23 (1st Cir. 1996), is even more to the point. There, the court found no First Amendment protection for a policymaker whose First Amendment rights of speech and association had been injured by his political opponents. 75 F.3d at 34. (App. A at 8-9).

To accept the Petitioners' argument is to ignore the political realities of modern day life, and its ordinary organization into two or more parties. This Court has recognized its "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open" (*New York Times Company v. Sullivan*, 376 U.S. 254, 270 (1964)) and a fundamental understanding that "competition in ideas and governmental policies is at the core of our electoral process. . . ." *Elrod* (citing *Williams v. Rhodes*, 393 U.S. 23, 32 [1968]) at page 357. Viewed against this background, it is clearly appropriate to require that the Petitioner — the chief law enforcement officer in the City of Holyoke — develop "a suitably thick skin to withstand the rigors of our societal, often highly politicized, life." *Agosto De-Feliciano*, at 1217. *See also Pieczynski v. Duffy*, 875 F.2d 1331, 1333 (7th Cir. 1989)

["harassment of a public employee for his political beliefs violates the First Amendment unless the harassment is so trivial that a person of ordinary firmness would not be deterred from holding or expressing those beliefs."] The Petitioner

> cannot expect to be the only policymaker in America insulated from criticism, hostility, political retribution and humiliation. . . . In any event, the federal Constitution does not set terms of engagement for warring factions of municipal government.

*Kaluczky v. City of White Plains*, 57 F.3d 202, 209 (2nd Cir. 1995).

To hold otherwise would open the "floodgates" of litigation, where the Courts would be "inundated by claims of unhappy politicians that their opponents had transgressed the boundary between constitutional and unconstitutional fair play." (App. A at 11). *See also Pieczynski*, *supra* at page 1332 (noting the "floodgate").

> When the Courts are flooded with litigation under that most unmanageable of standards (*Branti*) brought by that most persistent and tenacious of suitors (the disappointed officer seeker), we may be moved to reconsider our intrusion into this entire field.

*Rutan v. Republican Party of Illinois*, 497 U.S. 62, at page 115, (Scalia, dissenting).

## II.

## CERTIORARI IS INAPPROPRIATE AS NO CONFLICT OF OPINION AND AUTHORITY EXISTS BETWEEN THE COURTS OF APPEALS.

The Petitioner claims certiorari is warranted in this case because the First Circuit's opinion conflicts with decisions of the Court of Appeals for the Seventh Circuit and "possibly" those of the Court of Appeals for the Second Circuit. Once again, the Respondent has misconstrued and misapplied the holdings in cases he cites as supporting that proposition. (Pet. 15-18). Certiorari is proper only in cases where there is a "real and embarrassing conflict of opinion and authority between Courts of Appeals." *NLRB v. Pittsburgh S.S. Company*, 340 U.S. 498 (195[illegible] *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955). The purported conflicts here are neither real nor embarrassing.

Cases from the Second Court of Appeals present the clearest example of a *lack* of conflict with the First Circuit. The Petitioners cite *Lieberman v. Reisman*, 857 F.2d 896 (2nd Cir. 1988) which held that political retaliation not amounting to actual discharge of a public employee is actionable under 42 U.S.C. § 1983. The case was decided prior to this Court's decision in *Rutan*, *supra*, 497 U.S. 62 (1990) which resolved that question in the affirmative, at least with respect to those employees in non-policymaking or confidential positions where party affiliation was not an appropriate requirement for the effective performance of the job. By that time, the First Circuit had likewise recognized the viability of such an action for non-policymaking employees. *Agosto De-Feliciano v. Aponte-Roque*, 889 F.2d 1209 (1989).

Since *Rutan*, the Second Circuit has had another occasion to consider the issue in *Kaluczky v. City of White Plains*, 57 F.3d 202 (2nd Cir. 1995). Kaluczky was a Republican personnel officer, an

admitted "policymaking" position. *Id.* at 208. He had been reappointed to his position by a Republican mayor in the last year of the Republican administration. After a Democratic administration took office, Kaluczky alleged that they (the Mayor and members of the White Plains Common Council) engaged in a campaign of retaliation against him, in part, because of his political views and party affiliation. Specifically he alleged that the Defendants took retaliatory measures in order to induce his resignation. These retaliations included, *inter alia*, public humiliation and harassment, isolating him politically, curtailing his professional responsibilities and verbally assaulting him for his political affiliation and support of the previous administration. The Defendants also threatened to freeze his pay and to make him "go through hell" if he refused to resign. Kaluczky, however, did not resign. The Court held that, because the Plaintiff occupied a policymaking position, he had no First Amendment protection from either discharge or adverse employment actions as a result of his political beliefs and party affiliation. *Id.* at 207-209. The Court held that adverse employment actions, including discharge, demotion, refusal to hire, refusal to promote, reprimand and transfer of all Kaluczky's policy-making responsibilities to persons loyal to the Defendants, were "measures . . . fully condoned by the rationale of the *Elrod-Branti* line of cases regarding patronage dismissals." *Id.* at 208.

Thus there is nothing inconsistent between the decisions of the First Circuit or Second Circuit on these issues.

The Petitioner next claims that the First Circuit's decision below is contrary to *Wallace v. Benware*, 67 F.3d 655 (7th Cir. 1995). In that case, a Deputy Sheriff brought an action against the County Sheriff, claiming a First Amendment violation arose when the Sheriff retaliated against him through a campaign of harassment after the Deputy announced that he would run against the Sheriff in an upcoming election. The Seventh Circuit held that a campaign

of retaliatory harassment violated the Deputy's First Amendment rights even though an outright dismissal would not have. *Id.* at 662.

*Wallace* is distinguishable from the instant case in several respects. First, the campaign of harassment that was the subject of Wallace's Section 1983 claim was prompted solely by his political speech during the campaign, *Id.* at 656-657, and did not involve a First Amendment claim based upon Wallace's political associations, and, accordingly, differing legal considerations may apply. *Cf. Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Board of Education of Township High School Dist.*, 391 U.S. 563 (1968).

Second, the Deputy in *Wallace* retained his job, unlike the Petitioner in the instant case, who claims he was discharged, although constructively. Complicating the picture in *Wallace* was the fact that the Deputy's employment was governed by the terms of a collective bargaining agreement, and the Court appeared most distressed by the fact that the Deputy's job performance was hampered in virtually every respect, while he still maintained his job. The Court conceded, however, that a direct discharge in these circumstances would not violate the First Amendment. *Id.* 663. Those facts are distinguishable from those present in this Petitioner's case.

Finally, the Respondents respectfully submit that there is a marked difference between the duties and responsibilities of a Deputy Sheriff as opposed to a Chief of Police, who encounters political criticism and opposition from members of a City Council, who most assuredly have a right to comment on, criticize and vote on matters of policy affecting the police department. The First Circuit has already recognized that public employer actions short of dismissal, in the nature of harassment, adversely affecting a non-policy employee, based solely upon that employees' political affiliation, violates First Amendment right of association. *Agosta-De-Feliciano, supra. Wallace* presents no conflict with the First Circuit's holding on the facts of the instant case.

In conclusion, no real or embarrassing conflicts exist between the First Circuit and the cited circuits to warrant review of the decision below.

## CONCLUSION

For all the reasons stated herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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